88-1931

Supreme Court, U.S.
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CLERK

AMENDED
No. 89-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PAUL CAMEN,
Petitioner,

VS.

SAFECO INSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether sanctions can be imposed against a party under Federal Rules of Appellate Procedure Rule 38 absence a showing of "bad faith" on the part of the party.

LIST OF PARTIES

Petitioner is PAUL CAMEN.

Respondent is SAFECO INSURANCE COMPANY OF AMERICA.

Petitioner and Respondent are the same parties as in the proceeding below.

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No. 89-

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated January 20, 1989 and order dated March 14, 1989 denying the petition for rehearing and to reject the suggestion for a rehearing en banc is Appendix A pages A-1 through A-3. The order of the District Court dismissing plaintiff's complaint sua sponte is Appendix B at pages B-1 through B-7.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 14, 1989 and its order denying rehearing was entered on March 14, 1989. This

Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE INVOLVED

Federal Rule 38 of the Federal Rules of Appellate Procedure:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

A. Background

Petitioner, PAUL CAMEN, is an individual who resides in California. Respondent, SAFECO INSURANCE COMPANY, is a Washington corporation which is authorized by the State of California to issue automobile liability insurance policies.

Prior to April 03, 1986 respondent had issued to petitioner an automobile insurance liability policy. The policy provided for "continuous protection".

On or about April 03, 1986 the respondent stated it was not going to renew the policy of insurance.

On February 25, 1987 Petitioner filed suit in the Superior Court of the State of California. The suit alleged respondent violated Section 790.03 of the California Insurance Code when it cancelled the policy. The suit alleged the cancellation occurred because the petitioner had filed several claims with the respondent.

The California Supreme Court had not spoken on the issue of whether an insurer could be sued under Code Section 790.03. While there were California Appellate

decisions on point, petitioner believed a good faith argument could be made that the language used in the policy issued to him was different than the policy language used in the reported California Appellate decisions.

The respondent on April 02, 1987 filed a petition for removal of the action based on diversity of citizenship under 28 U.S.C. Section 1441.

The District Court possessed original jurisdiction under 28 U.S.C. Section 1332. The respondent moved for summary judgment which was to be heard on July 27, 1987. However, on September 03, 1987 the District Court *sua sponte* dismissed the complaint on the grounds respondent insurance company had the right not to renew the policy. The Ninth Circuit Court of Appeals, possessing appellate jurisdiction pursuant to 28 U.S. Section 1291, affirmed the district court judgment in its opinion filed on January 20, 1989. The appellate court also held the appeal was frivolous under Fed. R. App. 38 and granted respondent motion for sanctions in the form of attorney fees and double costs.

The petitioner then filed a petition for rehearing and a suggestion for a rehearing en banc on the sole issue of Fed. R. App. 38 application. The Appellate Court denied the petition on March 14, 1989.

B. The Proceedings in the District Court

The district court on September 03, 1987 dismissed the case *sua sponte.* The court found that there was no statutory duty imposed upon respondent to inform petitioner that the filing of excessive claims will result in non renewal of the policy. The District Court further held the respondent had the right to terminate the policy when the time for renewal occurs.

C. The Decision of the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal by the District Court. The Ninth Circuit cited California Appellate courts which had held an insurer does not have a legal duty to renew an automobile insurance policy citing *Greene vs. Safeco Ins. Co. of America,* 140 Cal.App.3d 535, 189 Cal.Rptr. 616, 618 (1983); *Travelers Ins. Co. vs. Lesher,* 187 Cal.App.3d 180, 231 Cal.Rptr. 791 803 (1986) *rev. denied.* (1987). The Ninth Circuit did not consider petitioner's argument that the language of the policy in the case at bar differed from the policy language in the *Green* and *Travelers* cases. The Ninth Circuit further held it was doubtful whether the California Supreme Court would establish a cause of action for bad faith for failure to renew a policy of insurance based on its recent decision of *Moradi-Shalal vs. Fireman's Fund Insurance Companies,* 46 Cal.3d 287, 250 Cal. Rptr. 116 (1988) which had rejected the right of a private right of action under the Section 790.03 of the California Insurance Code.

The Ninth Circuit then held the appellant had failed to state a cause of action and could not plead any set of facts in support of his claim. The District Court was correct in its dismissal *sua sponte* of the complaint.

The Ninth Circuit then without discussion held the appeal was "frivolous".

The petitioner then filed a petition for rehearing on the sole issue of the application of Rule 38 Fed. R. App. Proc. The petitioner argued the complaint was filed in good faith on the grounds the language in the policy issued to him was different from the policy language issued in the reported appellate decisions. The petitioner further argued that the decision of *Moradi-Shalal* (supra) had no

application to the issue since that decision was (1) rendered after the decision of the District Court and (2) did not apply to first party cases but only third party cases. The Ninth Circuit without comment denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER COURT OF APPEALS ON WHETHER A SHOWING OF BAD FAITH IS REQUIRED FOR THE IMPOSITION OF SANCTIONS UNDER RULE 38 FEDERAL RULES OF APPELLATE PROCEDURE

The case presents an opportunity, on a limited and essentially undisputed record, for this Court to provide meaningful guidance to the lower courts on the subject of the proper application of Rule 38 sanctions. This case illuminates conflicts among the circuits regarding the application of Rule 38 and primary the issue of whether a showing of "bad faith" is required for sanctions to be imposed.

A. The Decision Below is in Conflict With Other Circuits Which Have Required a Showing of Bad Faith Before Sanctions will be Imposed Under Rule 38 Federal Rules of Appellate Procedure

Rule 38 F.R. App. Proc. allows sanctions to be imposed if the appeal is deemed "frivolous". The Rule does not define the term "frivolous".

The Ninth Circuit does not require a showing of "bad faith" on the part of counsel before it imposes attorney fees under Rule 38. The test adopted by the Ninth Circuit

is, "An appeal is frivolous if the result is obvious or if the claim of error is wholly without merit." See *Molhart vs. Southern Cal. Ret. Clerks Union,* 735 Fed.2d 1133, 1137 (9th Cir. 1984). *De Witt vs. Western Pac. R. R. Co.,* 719, Fed.2d 1448, 1451, (9th Cir. 1983). This test does not require a showing that counsel acted in bad faith and is wholly subjective to the whims of the court. What may be "obvious" one day to justify sanctions may be somewhat cloudy the next day.

The other circuits have taken far different approaches toward the imposition of Rule 38 sanctions. For example the Second Circuit has held, "The imposition of sanctions, however, is highly unusual and requires a clear showing of bad faith on the part of appellants." *West Virginia vs. Charles Pfizer and Co.,* 440 Fed.2d 1079, (2d Cir. 1971) *cert. denied,* 404 U.S. 871 (1971); disapproved on other grounds in *Illinois Brick Co. vs. Illinois,* 431 U.S. 720 (1977) *rehearing denied,* 434 U.S. 881 (1977). The Seventh Circuit has also adopted a requirement of "bad faith" before Rule 38 sanctions are assessed. As the court held in *Ruderer vs. Fines,* 614 Fed.2d 1128, 1132-33 (7th Cir. 1980) "Typically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinancy." (Citations omitted) The Sixth Circuit apparently also requires a showing of bad faith though the Circuit has not expressly stated the requirement. See *Dallo vs. INS,* 765 Fed.2d 581, 589, (6th. Cir. 1985), appeal is frivolous "if it is obviously without merit and is prosecuted for delay, harrassment, or other improper purposes."

Other circuits, while not requiring a showing of actual bad faith before imposing sanctions under Rule 38 do

require a strong showing and impose sanctions only in unusual circumstances. For example, the Eighth Circuit denied sanctions under Rule 38 even though it found the appeal to be meritless since the appellee responded to a typewritten brief with a printed one. The Court stressed that the court should be "cautious" in awarding sanctions. See *Underwood vs. Jefferson Memorial Hospital,* 639 Fed. 455, 458 n.3 (8th Cir. 1980).

II

BECAUSE OF THE SPLIT BETWEEN THE CIRCUITS THIS COURT SHOULD CLARIFY THE APPLICATION OF RULE 38 TO ELIMINATE THE INCONSISTENCY REGARDING THE REQUIREMENTS OF BAD FAITH

As documented above there is a major split between the circuits as to whether "bad faith" is a requirement before sanctions may be imposed under Rule 38.

While this court has held that Rule 38 "affords a Court of Appeals plenary discretion to assess just damages", *Burlington Northern R. Co. vs. Woods,* ____ U.S. ____, 107 S.Ct. 967 (1987), an ad hoc approach on the subject should not exist. As explained supra the imposition of sanctions under Rule 38 can cause a "chilling effect" on the valued right of access to the courts. Without some guidance by this court as to the parameters regarding the proper application of Rule 38 haphazard results will occur obfuscating the purpose behind the enactment of the rule.

Without suggesting Rule 38 should be placed in a straightjacket, deciding whether a showing of bad faith is a requirement is a necessary and proper function of this Court. This case provides a vehicle for the Court to make this determination.

A. A Requirement of Bad Faith Would Serve the Purpose Behind Rule 38 And Yet Still Allow Freedom of Access To The Courts

There is a tension between the imposition of sanctions under Rule 38 and the freedom of access to the courts which such sanctions infringe upon. This court has recognized the problem and has sided with the right to freedom of access. In *Florence Talamin et al vs. Allstate Insurance Company*, 470 U.S. 1067, 85 L.Ed. 125, 105 S.Ct. 1824 (1985) this court was faced with whether to impose sanctions under this court rule 49.2 which allows sanctions to be imposed when an appeal to the court is frivolous. The majority remarks bear repeating:

> "Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access. . . . But the strong presumption is against the imposition of sanctions for invoking the processes of the law." (Footnotes omitted).

As the Court in *Talamin* (supra) was, however, quick to note there are situations where sanctions are appropriate such as when counsel have pursued the litigation merely to generate fees for themselves, or for purposes of delay.

With the courts struggling to remain afloat in a constantly rising sea of litigation there is little question in the appropriate case sanctions should be imposed.

In *Clarion Corp. vs. American Home Products Corp.,* 494 Fed.2d 860, 865m (7th Cir.) *cert. denied,* 419 U.S. 870, 95 S.Ct. 128, 42 L.Ed. 2d 303 (1974), the court held one of the purposes of Rule 38 is to deter meritless arguments appeals "and thus to preserve the appellate court calendar for cases worthy of consideration." Placing a uniform requirement of a showing of "bad faith" on the part of the appellant would serve the purpose of the rule and yet would still allow the parties full access to the courts. The requirement would penalize the wrongdoer for wasting the court's time and yet not deter counsel from vigorously pursuing the interest of their clients. See Canon 7 ABA Model Code of Professional Responsibility.

Rule 38 Fed. Rules of Appellate Procedure can play an important role in the administration of justice. As the Sixth Circuit has observed a frivolous appeal can "itself be a form of obscenity . . . and should doubtless be more often enforced than ignored in the face of a frivolous appeal." *WSM, Inc. vs. Tennessee Sales Co.,* 709 Fed.2d 1084, 1088 (6th Cir. 1983). The problem with the enforcement of the Rule is the discrepancy between the circuits as to when it should be considered. This case presents an opportunity to resolve the conflicts among the circuits concerning whether the element of bad faith is a proper factor to consider under Rule 38 while still allowing the lower courts the discretion to apply the rule as they deem just.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit on the sole issue of the application of Rule 38 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

Thomas Edward Wall
Counsel for Petitioner,
Paul Camen

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL CAMEN,
Plaintiff,

v.

SAFECO INSURANCE COMPANY OF AMERICA, INC.,
DOES I through X, Inclusive,
Defendants.

Case No. CV 87-2118 JMI (Bx)

ORDER OF DISMISSAL

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED, as follows:

1. The Court, *sua sponte,* dismisses plaintiff's complaint with prejudice. The plaintiff is suing the defendant for violation of the California Insurance Code Section 790.03(h)(1) and for Breach of the Implied Covenant of Good Faith and Fair Dealing. Specifically, the plaintiff alleges that the defendant insurance company acted in bad faith by failing to inform the plaintiff that the filing of excessive claims could result in the cancellation of his policy. The Court finds that there is no statutory duty imposed upon defendant to inform its insured that the filing of excessive claims will result in non-renewal of the policy. Moreover, an insurance company has a right to terminate its policy when the time for renewal occurs. Accordingly, since the plaintiff did not allege any impro-

priety regarding the non-renewal of defendant's policy, the plaintiff's complaint for violation of California Insurance Code Section 790.03(h)(1) and for Breach of the Implied Covenant of Good Faith And Fair Dealing is DISMISSED with prejudice.

2. Furthermore, the defendant's Motion for Summary Judgment and Summary Ajudication of Certain Facts Without Controversy is MOOT.

IT IS SO ORDERED.

DATED: September 3, 1987

JAMES M. IDEMAN

James M. Ideman
United States District Judge

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, the undersigned state: I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 12063 Jefferson Blvd. Culver City, California.

On Oct. 31, 1987, I served the within document:

CIVIL APPEALS DOCKETING STATEMENT

on the person(s) indicated below, by placing one true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Mr. Robert P. Baker
16340 Roscoe Blvd.
Van Nuys, California 91406-1215

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Oct. 31, 1987, at Los Angeles, California.

DENISE CHU

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL CAMEN,
Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
No. 87-6428
D.C. No. CV-87-2118-JMI

MEMORANDUM*

Submitted January 13, 1989**
Pasadena, California

BEFORE: ALARCON, BRUNETTI, and THOMPSON,
circuit Judges

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

I.

FACTS AND PROCEEDINGS

Appellant was insured by Safeco, appellee here, under an automobile liability policy. The policy was labeled "Continuous Protection Plan" and contained the language, "This policy will be extended automatically each six months term on payment of the premium when due." The policy also stated:

(c) This agreement shall apply to each successive policy period for which the company consents to renew or continue this policy but nothing herein shall obligate the company to renew or continue this policy beyond the expiration of the policy period.

Appellee's Brief, Appendix A, § 15(c). On April 3, 1986, appellee refused to renew the policy upon tender of the premium. Appellant then brought this action on February 25, 1987, in the Superior Court of California. The defendant removed the action to the U.S. District Court under 28 U.S.C. § 1441 on diversity grounds. Appellant alleged in his complaint a violation of California Insurance Code § 790.03 and breach of the covenant of good faith and fair dealing for refusal to renew the policy and sought general and punitive damages. Appellee moved for summary judgment and although a hearing was scheduled for July 27, 1987, the court declined to hear oral argument. On September 4, 1987, the district court dismissed the complaint for failure to state a claim which effectively mooted appellant's summary judgment motion. Appellant appealed on September 28, 1987.

II.

DISCUSSION

Appellant contends the district court erred when it dismissed the appellant's action sua sponte. We review this question of law de novo. *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987). California law applies to this diversity action. *Erie v. Tompkins R. R.*, 304 U.S. 64, 78 (1936).

Appellant argues that appellee is liable for "bad faith non-renewal" of his automobile insurance policy under Cal. Ins. Code § 790.03(h) and under the covenant of good faith and fair dealing. Both parties recognize that the California Supreme Court has not spoken specifically to the issue of non-renewal of insurance policies. Although it is unclear from the facts, appellant made some excessive claims on his policy. After appellee gave appellant the requisite notice (as required in the policy), it canceled the policy. Appellee had not told appellant that it had this discretion previous to appellant's purchase of the policy. The district court found no statutory duty of an insurer to inform insureds that the filing of excessive claims will result in non-renewal of the policy. And, the district court found that an insurance company has a right to terminate its policy when the time for renewal occurs. [CR 12]

The California Supreme Court has spoken on private rights of action under Cal. Ins. Code § 790.03(h). *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal.3d 287, 250 Cal.Rptr. 116 (1988). The court held that the insurance statute was meant to deal with administrative

regulation of insurance practices by the Commissioner of Insurance. *Id.* at 126.

> Neither section 790.03 nor section 790.09 was intended to create a private civil cause of action against an insurer that commits one of the various acts listed in section 790.03, subdivision (h).

Id. The court also made their decision prospective and the decision, which overruled *Royal Globe Ins. Co. v. Superior Court,* 23 Cal.3d 880, 153 Cal.Rptr. 842 (1979), will not apply to those cases seeking relief under section 790.03 filed before the decision here (August 18, 1988). Appellant's complaint here is not barred by the case but is doubtful that this California Supreme Court would find any new private causes of action under 790.03 — that is one for non-renewal of a policy.

Further, the California court would probably be inclined not to create a "bad faith" cause of action for non-renewal of insurance policies. The California appellate courts have spoken on the issue of whether an insurer has a legal duty to renew an automobile insurance policy once a term has expired. *See Greene v. Safeco Ins. Co. of America,* 140 Cal.App.3d 535, 189 Cal.Rptr. 616, 618 (1983); *Travelers Ins. Co. v. Lesher,* 187 Cal.App.3d 180, 231 Cal.Rptr. 791, 803 (1986) *rev. denied,* (1987). In *Greene* the court analyzed a policy provision exactly like the one in the present case:

> This agreement shall apply to each successive policy period which SAFECO consents to renew or continue this policy but nothing herein shall obligate SAFECO to renew or continue this policy beyond the expiration of any policy period.

Id., 189 Cal.Rptr. at 617. In that case, Safeco terminated the insured's coverage because they felt she had been

uncooperative. *Id.* The insured argued there that Safeco's failure to renew her insurance policy was a breach of the implied covenant of good faith and fair dealing. *Id.* The insured argued that the reason for termination was arbitrary and in bad faith. However, Cal. Ins. Code § 667 provides "there shall be no liability on the part of, and no cause of action of any nature shall arise against . . . in any insurer . . . for any statement made . . . in any written notice of cancellation or nonrenewal, or in any other communication, oral or written, specifying the reasons for cancellation or nonrenewal." *Id.*, 189 Cal.Rptr. at 617-18. The court held that Safeco owed no duty to renew the policy and was not liable for damages for breach of the covenant of good faith and fair dealing. *Id.*

> To require liability coverage against the judgment of the contracting parties would constitute an unprecedented judicial interference into private contractual and economic arrangements.

Id., 189 Cal.Rptr. at 619 (citing *Farmers Ins. Exchange v. Cocking*, 29 Cal.3d 383, 390, 173 Cal.Rptr. 846, 850 (1981)). "Unless the policy provides otherwise, an insurer has no legal duty to renew an insurance policy when its term has expired." *Travelers*, 231 Cal.Rptr. at 803. This policy did not "provide otherwise."

Appellant has failed to state a cause of action under California "bad faith" law and under Cal. Ins. Code § 790.03(h). Even if all allegations of material fact are taken as true and construed in the light most favorable to appellant, "it appears beyond doubt that [appellant] can prove no set of facts in support of his claim which would entitle him to relief." *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986). A trial court may dismiss a claim sua sponte under Fed. R. Civ. P. 12 (b)(6) where claimant could not possibly win relief. *Omar* at 991.

Therefore the district court properly dismissed this action here. *Id.*

Appellant's appeal is frivolous, and accordingly appellee's motion for sanctions under Fed. R. App. P. 38 is granted. Appellee shall be granted on application its attorneys fees and double costs.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL CAMEN,
Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.

No. 87-6428
D.C. No. CV-87-2118-JMI

ORDER*

BEFORE: ALARCON, BRUNETTI, and THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

AMENDED

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California.

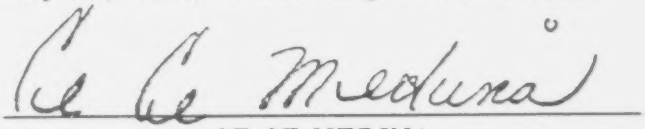
On May 30, 1989, I served the within Petition for writ of certiorari in re: "Paul Camen v. Safeco Insurance Co. of America" in the United States Supreme Court, October Term 1988, on all Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mr. Robert P. Baker
Attorney at Law
16430 Roscoe Boulevard
Van Nuys, California 91406-1215

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 30, 1989, at Los Angeles, California



CE CE MEDINA

Supreme Court, U.S.
FILED
SEP 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1931

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PAUL CAMEN,

Petitioner,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEAL FROM THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Attorneys for Defendant-Respondent, SAFECO INSURANCE COMPANY OF AMERICA, a Washington Corporation

QUESTION PRESENTED FOR REVIEW

1. Whether sanctions can be imposed against a party under Federal Rules of Appellate Procedure Rule 38 absence a showing of "Bad Faith" on the part of the party.

LIST OF PARTIES

Petitioner is PAUL CAMEN.

Respondent is SAFECO INSURANCE COMPANY OF AMERICA, A WASHINGTON CORPORATION.

Petitioner is the plaintiff-Appellant in the proceeding below.

Respondent is the defendant-Appellee in the proceeding below.

III.

ADOPTION OF THE MINORITY VIEW THAT SUBJECTIVE BAD FAITH IS REQUIRED TO IMPOSE SANCTIONS UNDER RULE 38 DEFEATS THE PURPOSES FOR WHICH THAT RULE WASENACTED AND INFRINGES UPON THE INHERENT POWER OF COURTS TO REGULATE THEIR CALENDARS.....16

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APPENDIX A. MOTION FOR SANCTIONS [C.C.P. 907] AND FOR A FINDING THAT THE APPEAL IS FRIVOLOUS [FRAP 36]

No. 88-1931

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

PAUL CAMEN,
Petitioner,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are accurately set forth in the petition.

JURISDICTION

Respondent agrees with the jurisdictional statement of petitioner as articulated in his petition.

FEDERAL RULE INVOLVED

Rule 38 of the Federal Rules of Appellate Procedure:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double cost to the appellee.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner, PAUL CAMEN, is an individual who resides in California. Respondent, SAFECO INSURANCE COMPANY, is a Washington Corporation which is authorized by the State of California to issue automobile liability insurance policies.

Prior to April 3, 1986, respondent had issued to petitioner an automobile insurance liability policy.

On/or about April 3, 1986, respondent opted not to renew the policy of insurance. In the District Court as well as in the Ninth Circuit Court of Appeal, the facts were undisputed that respondent had complied with all California Insurance Code regulations regarding non-renewal

of the policy, e.g., notice, etc..

On February 25, 1987, Petitioner filed suit in the Superior Court of the State of California. The suit alleged respondent violated Section 790.03 of the California Insurance Code when it refused to renew the policy.

The California Court of Appeal in Greene v Safeco Insurance Co., 140 Cal. App. 3d. 535, 189 Cal. Rptr. 791 (1986) held that Safeco had no duty under the terms of its policy, or otherwise, to renew the policy. The relevant language of the insurance policy in Greene was IDENTICAL to the language of the policy in the case at bar. Both policies provided explicitly that nothing would obligate the insurer to renew the policy. The legal issues raised were likewise identical to those raised by petitioner herein.

On April 2, 1987, respondent successfully filed a petition for removal of the action from California

state court to the District Court based on diversity of citizenship under 28 U.S.C. Section 1441.

Respondent moved for summary judgment. On September 3, 1987, the District Court dismissed petitioner's complaint suasponte on the ground that respondent insurance company had the right not to renew the policy.

Although respondent's attorney explicitly advised and warned petitioner's attorney that the issues underlying this action had been firmly decided in Greene, supra, and despite the fact that petitioner's attorney was advised that the language of the policy in Greene was identical to the language of the policy in the case at bar, petitioner and his attorney elected to pursue the appeal in the Ninth Circuit Court of Appeal. In a letter from respondent's counsel to petitioner's counsel, petitioner was advised that pursuing the appeal in light of Greene would be construed as

frivolous.

The Ninth Circuit Court of Appeals, possessing appellate jurisdiction pursuant to 28 U.S.C. Section 1291, affirmed the district court judgment in its opinion filed on January 20, 1989.

The Ninth Circuit Court of Appeals held that the California Appellate Courts had spoken on the issue of whether an insurer has a legal duty to renew an automobile insurance policy once a term had expired and cited Greene, supra, and Travelers Insurance Co. vs. Lesher, 187 Cal. App. 3d 180, 321 Cal. Rptr. 791, 803 (1986).

The Ninth Circuit Court of Appeals also held the appeal was frivolous under Federal Rules of Appellate Procedure 38 and granted respondent's motion for sanctions in the form of attorneys' fees and double costs. The basis for this award was not only the utter lack of merit to the appeal, but the fact that petitioner had been directly warned

of the consequences of pursuing the frivolous appeal, and nevertheless elected to proceed.

Petitioner subsequently filed a petition for rehearing and a suggestion for a rehearing en banc on the sole issue of sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure. The Ninth Circuit Court of Appeals denied the petition on March 14, 1989.

B. MATERIAL FACTS

The underlying claim of petitioner was that respondent violated California Insurance Code Section 790.03 when it failed to renew petitioner's automobile liability insurance policy. The policy in question explicitly provided that respondent had the unconditional right to refuse to renew the policy.

The language of the policy was identical to the policy in Greene, supra.

Prior to pursuing the appeal to the Ninth

Circuit Court of Appeal, petitioner, through his attorney, was advised of the holding in Greene, supra, and was advised that the two insurance policies were identical insofar as the relevant language was concerned. Petitioner's counsel was warned that the appeal was without merit and that it would be construed as frivolous. Despite the fact that Greene was directly on point and involved precisely the same insurance policy language, and despite the absence of any other pertinent authority to support petitioner's contentions, petitioner elected to pursue the appeal.

In the motion for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure, respondent pointed out that petitioner's attorney had been advised of the applicability of Greene and had been warned of the consequences of pursuing an appeal which patently had no merit. The motion also pointed out that the contention of

petitioner's attorney was fundamentally that the insurance policy in Greene was factually distinguishable from the policy in the present case. Since the relevant language of the two policies were identical, Respondent asserts that this contention of petitioner could not have been made in good faith. The Ninth Circuit court of Appeal very likely agreed with this assertion.

REASONS FOR DENYING THE WRIT

I

THE ACTIONS OF PETITIONER HEREIN WOULD BE CONSTRUED AS "FRIVOLOUS" UNDER ANY STANDARD, INCLUDING ONE REQUIRING EXPLICIT "BAD FAITH" AND A RESOLUTION OF THIS ISSUE IN THIS CONTEXT WOULD BE MORE IN THE NATURE OF AN ADVISORY OPINION.

In the case at bar, the Ninth Circuit Court of Appeals could have awarded sanctions pursuant to

Rule 38 of the Federal Rules of Appellate Procedure, regardless of which standard of "frivolousness" were being applied. This was not a situation where the only basis for the award was the lack of merit of the appeal. As noted supra, petitioner could have not have genuinely entertained a subjective belief that the appeal was meritorious.

Respondent would submit that a proper factual setting in which the Supreme Court should determine the issue of how Rule 38 was to be applied would involve a situation where the Circuit Court explicitly found there to be no subjective bad faith, and where the court based its award of sanctions solely on the lack of merit to the appeal.

Respondent contends that even if the most strict standard were applied, i.e., requiring a showing of subjective bad faith, that standard would be met under the present facts. Therefore,

a decision by this Court would have little practical effect on the outcome. The decision would be more in the nature of an advisory opinion.

Petitioner attempts to characterize the facts underlying the Ninth Circuit's order granting sanctions as involving a situation where the appeal was prosecuted in good faith, but was deemed frivolous solely because it lacked merit.

However, an examination of the motion for sanctions attached hereto as Appendix A discloses that Respondent's attorney advised Petitioner's attorney that the insurance policy in question had precisely the same language as the policy in Greene.

No litigant can demonstrate what another party or attorney is thinking. In jurisdictions where some showing of "bad faith" is required, such bad faith can only be demonstrated by reference to objective criteria. The only time that subjective

bad faith can be proved directly is where the party or attorney explicitly states that he is undertaking the appeal in bad faith, a situation which rarely, if ever, would take place.

Where, as here, a party and his attorney know of a controlling case interpreting precisely the same insurance policy language under the same circumstances, pursuing the appeal is in "bad faith" and would be construed as "frivolous" under any standard applied by the Circuit Courts of Appeal.

II

THE CIRCUITS COURTS OF APPEAL DO NOT VARY SUBSTANTIALLY IN THEIR PRACTICAL APPLICATION OF RULE 38

Petitioner contends that there is a great disparity amongst the Circuits in defining the term "frivolous appeal", as that phrase is used in Rule 38 of the Federal Rules of Appellate Procedure.

Petitioner points to a handful of cases which inferentially apply different or more strict standards than the majority.

Respondent contends that these differences are more a matter of semantics than substance. Furthermore, the differences may simply be attributable to the manner in which each circuit chooses to manage its own calendar. In practical effect, Respondent contends there is little difference between the circuits, and that, in any case, the great majority of circuits apply the principles applied in the Ninth Circuit Court of Appeals.

Rule 38 of the Federal Rules of Appellate Procedure, is premised upon existing case law, and complements 28 U.S.C. Section 1912, which states:

> "When a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The Advisory Committee Note to Rule 38 cited a number of cases as illustrative of the allowance of damages, attorney's fees and costs where an appeal was found frivolous without requiring a showing that the appeal resulted in a delay, and Rule 38 is apparently a legislative recognition of the availability of such sanctions in the absence of any delay. These existing cases awarding sanctions demonstrate that Rule 38 was merely a codification of prior case law. (See: Dunscombe v Sayle 340 F 2d 311 (5th Cir. 1965), certiorari denied 382 U.S. 814; Lowe v. Willacy, 239 F. 2d 179 (9th Cir. 1956)).

Petitioner would have this Court believe that the Ninth Circuit Court of Appeals is inclined to grant sanctions whenever an appeal lacks merit. Petitioner contends that such an approach deprives good faith litigants of their access to the courts.

However, an examination of the approach taken

by the Ninth Circuit discloses that it is sensitive to its obligation to provide access to good faith litigants, and that sanctions are not awarded simply because an appeal lacks merit.

For example, in Grimes v C.I.R., 806 F. 2d 1451 (9th Cir. 1986), the court summarized its approach as follows:

> "We are sensitive to the obligation of the courts to provide access for petitioners seeking in good faith to avail themselves of the protection of the law, and we do not impose sanctions lightly. We are also aware that an appeal that lacks merit is not always frivolous."

The court continues, stating:

> "These principles do not, however, inhibit the court from imposing sanctions when presented with unsupportable appeals, presenting no colorable claim of error. Sanctions are appropriate when the result of an appeal is obvious and the arguments of error are wholly without merit. (citations)".

As noted above, the Ninth Circuit will not penalize appellants who act in good faith, but who are merely wrong in their contentions. The Ninth Circuit Court of Appeals limits sanctions to those situations where the appeal is so patently lacking in merit as the bad faith of the appellant and/or his attorney is inherent in the filing of such an appeal.

As pointed out in Petitioner's brief, a few courts have ostensibly require a showing of "bad faith" before sanctions would be imposed under Rule 38. (e.g., State of West Virginia v Chas. Pfizer & Co., 440 F 2d 1079, 1092 (2d. Cir. 1971).

However, even in the Second Circuit where a requirement of bad faith was deemed to exist in one case, other cases have applied a different standard more consistent with the other circuits, including the Ninth Circuit. For example, in Simon & Flynn, Inc. v Time Incorporated, 513 F. 2d 832,

834 (2d Cir. 1975), the court, apparently recognizing that the decision to undertake an appeal without merit, or without assessing whether it has merit may be objective evidence of bad faith, warned:

> "Counsel must realize that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk reaction to every unfavorable ruling."

Petitioner also cited Ruderer v Fines, 614 F. 2d 1128 (7th Cir. 1980) for the proposition that bad faith was required in the Seventh Circuit. While the Ruderer court ostensibly requires both that the appeal be frivolous and in bad faith, an examination of the manner in which this purported standard is actually applied discloses that it is, from a practical standpoint, no different than the approach in the majority of circuits.

The Ruderer court stated:

> "Typically the courts have looked for some indication of the appellants' bad

> faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinacy (citations)"

It is interesting to note that although Petitioner contends that approach is distinct from other circuits, the Ruderer court cites as authority for this proposition cases from the 7th, 9th, 2d and 1st circuits. It should be noted that in Ruderer, sanctions were in fact awarded.

The great majority of circuits hold that sanctions are appropriate under Rule 38 where it is found that the appeal is obviously without merit, the appellant's arguments totally unsound, the judges' time and energies wasted, and the appellee put to the inconvenience and expense of employing counsel to resist such a frivolous appeal. (Simon & Flynn, Inc. v Time Incorporated, Supra, supra, 513 F. 2d 832, 833-834(2d Cir. 1975); Monroe Auto

Equipment Co., Hartwell Division v National Labor Relations Board, 511 F. 2d 611, (5th Cir. 1975)); Hewitt v City of Stanton, 798 F. 2d 1230 (9th Cir. 1986) (sanctions proper where no plausible argument); Coghlan v Starkey, 852 F. 2d 806 (5th Cir. 1988) (finding of bad faith not necessary to impose sanctions where appeal frivolous); Braley v Campbell, 832 F. 2d 1504 (10th Cir. 1987) (intentional or reckless disregard of attorney's duties to court based on objective view of conduct is sufficient to impose sanctions without a showing of subjective bad faith); Ratcliff v State of Tex., 714 F. 2d 24 (5th Cir. 1983) (presentation of meritless arguments previously rejected in district court was frivolous warranting sanctions)).

In Sun Ship, Inc. v Matson Nav. Co., 785 F. 2d 59, 64 (3d Cir. 1986), the court stated:

> "Rule 38 focuses on the merits of the appeal regardless of good or bad faith."

The court held that where an appeal is utterly without merit, it is frivolous under Rule 38 and sanctions are appropriate.

In Asbury v Brougham, 866 F. 2d 1276 (10th Cir. 1989), the court held that subjective bad faith is not a prerequisite to sanctions and that an appeal "in which the result is obvious, or whether the appellant's claims are utterly meritless: is sufficient to impose sanctions. (Citing: Int'l Union of Bricklayers v Martin Jaska, Inc., 752 F. 2d 1401 (9th Cir. 1985) and Braley v Campbell, 832 F. 2d 1504, 1510-1512 (10th Cir. 1987))

In Natasha, Inc. v Evita Marine Charters Inc., 763 F. 2d 468, 471 (1st Cir. 1985), sanctions were awarded where, through a minimal amount of research, the Appellant could have discerned that its contentions were without merit.

When a court analyzes whether particular conduct is undertaken in bad faith, it must

necessarily examine objective criteria. In only the rarest of instances does a court have direct evidence of the what a party or his attorney are thinking. Subjective motivation must usually be inferred from objective criteria.

Respondent contends that the most critical factor in determining whether an appeal is undertaken in good faith is the merits of the appeal. Where, as here, the appeal is utterly lacking in merit due to definitive case law on the precise issue involved, where the facts are clearly not distinguishable, and where the appellant is explicitly advised that the appeal is therefore lacking in merit, the appeal must necessarily be construed to be in bad faith.

Similar logic was applied in Bailey v Bicknell Minerals, Inc., 819 F. 2d 690, 693 (7th Cir. 1987) where the court stated:

> "[T]he arguments are frivolous on an objective standard...Telling would-be

> litigants that the law is against them is an essential part of a lawyer's job... Plaintiff's lawyer...should have told his clients this. We therefore order counsel for the plaintiffs to pay, out of his own pocket, the attorney's fees reasonably incurred...in defending against the appeal."

Respondent believes that the criteria applied by the few circuits explicitly requiring "bad faith" and those which hold that utter lack of merit to the appeal justify sanctions, are from a practical standpoint, virtually the same. Pursuing an appeal which is utterly without merit is subjectively undertaken in bad faith. Therefore, the distinction between these tests is more in the nature of semantics, and in practice, has little significance.

III

ADOPTION OF THE MINORITY VIEW THAT SUBJECTIVE BAD FAITH IS REQUIRED TO IMPOSE SANCTIONS UNDER RULE 38 DEFEATS THE PURPOSES FOR WHICH THAT

RULE WAS ENACTED AND INFRINGES UPON THE INHERENT POWER OF COURTS TO REGULATE THEIR CALENDARS

Requiring an explicit showing of subjective bad faith would promote only one of the several purposes behind Rule 38. Respondent concedes that one of the purposes is to punish the appellant who interposes a frivolous appeal. However, the rule is also enacted in order to protect the Appellee from needless expenditure of time and money, and to permit the court to regulate its calendar and prevent the undue consumption of judicial resources on meritless matters.

In Burlington Northern R. Co. v Woods, 480 U.S. 1, 94 L. Ed. 2d 1 (1987), referring to Rule 38, this Court stated:

> "Under the Rule, 'damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant'. (citation)"

The Burlington opinion further states:

> "Rule 38 affords a Court of Appeals plenary discretion to assess 'just damages' in order to penalize an appellant who take a frivolous appeal and to compensate the injured appellee for the delay and added expense...Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals..."

Both this case and the advisory comment to Rule 38 recognize that the rule was enacted not only to penalize the appellant, but to protect the appellee. Furthermore, because Rule 38 emanates from existing case law, and because courts have certain inherent powers, one of its implied purposes is also to deter frivolous appeals and thereby allow courts to regulate their calendars. This court has recognized the benefit of a case by case approach giving the court of appeal plenary discretion.

A rule which would require a showing of subjective bad faith will do nothing to protect

Appellee's from the harm inherent in an appeal which is utterly lacking in merit. Such a rule imposes the entire burden of the appellant's incompetence on the appellee. Particularly where, as here, the appellant is represented by counsel, the burden of pursuing an appeal which is patently without merit should be placed on the party who caused it, not the innocent appellee.

In Clarion Corporation vs. American Home Products Corporation, supra, 494 Fed. 2d 860, 865 (7th Cir.) cert. denied, 419 U.S. 870, 95 S. Ct. 128, 42 L. Ed. 2d 303 (1974) a pro se litigant's attempt to relitigate matters which had become final was strongly rebuked, with the court stating:

> "Klein's cause of action since the dismissal of the case...has been frivolous and obstructive and has caused a shameful waste of judicial manpower.
>
> 'Rule 38 was designed to penalize litigants for just such tactics as those and to compensate those who have been put to the expense of answering such wholly frivolous

appeals [citations].

The "subjective belief" language of Grimes was also quoted with approval in Lefebvre vs. C.I.R., 857 F. 2d 420 (1st Cir. 1988).

If Rule 38 is to be used with its full measure of effectiveness to achieve all of its purposes, then the courts must be free to apply the Rule without regard to the subjective belief of the frivolous litigant. As the court in WSM, Inc. vs. Tennessee Sales Co., 709 F. 2d 1084 (6th Cir. 1983) said:

> "[W]ith courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity. Rule 38 should doubtless be more often enforced than ignored in the face of a frivolous appeal." (WSM, Inc. at p. 1088)

If the courts were forced to find bad faith before they could apply Rule 38 the Grimes and Kleins of America would fast turn the "rising sea" of litigation into a flood.

The harm sought to be avoided by Rule 38 is the same whether or not the appeal is subjectively in bad faith. A litigant who pursues an appeal out of ignorance causes the same harm to the appellee and to the judicial system that an appellant who acts with subjective bad faith causes. Bad judgment is just as harmful as subjective bad faith. Penalizing the litigant is not the only purpose of Rule 38.

Petitioner quoted Florence Talamin et al vs. Allstate Insurance Co., 470 U.S. 1006, 85 L. Ed. 125, 105 S. Ct. 1824 (1985) for the proposition that "freedom of access to the courts is a cherished value in a democratic society" which should be preserved and not chilled with the imposition of sanctions which would result in hesitant litigants.

However, the Talamin Court went on to award $1,000 in sanctions against appellant's counsel holding:

> "Further while freedom of access to the Courts is indeed a cherished value, ever misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to judicial process. The time this court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration."
> (Talamin at 1827).

The Talamin court recognized the fact that while litigants with dubious claims might be chilled by the imposition of sanctions, those with valid claims certainly would be if denied access to a clogged court system.

The application of Rule 38 by the majority of courts encourages a party to seriously contemplate his decision before filing an appeal. Such an approach is favored by the courts.

This principle has even more apparent application to the facts in the case at bar. Not only was Petitioner put on notice of the lack of

merit of his claims by the order of dismissal by the District Court, but Petitioner's counsel was explicitly notified of the lack of merit to the appeal and given the opportunity to withdraw the appeal before Respondent was unduly burdened.

Where no subjective bad faith in the form of an ulterior motive exists, the courts must sill have a means of discouraging stubborn litigants like the instant petitioner who assert claims shown to be meritless. Such persistence in asserting a claim known to be without merit is itself bad faith.

"Where legal theories are strongly rejected below, the imposition of appellate costs is justified." (Biermann vs. C.I.R. 769 F.2d 707 (11th Cir. 1985), cert. den. 107 S. Ct. 1184)

Respondent would submit that pursuing an appeal on grounds that are known to be without merit is itself a sufficient showing of "bad faith". Although different circuits use different words to

characterize the test being applied, the practical result is essentially the same. None of the circuits have required an explicit showing of some ulterior motive and those which require "bad faith" construe persisting with an invalid claim as constituting bad faith. As a practical matter, Respondent therefore contends that the Circuits are essentially uniform in their application of Rule 38.

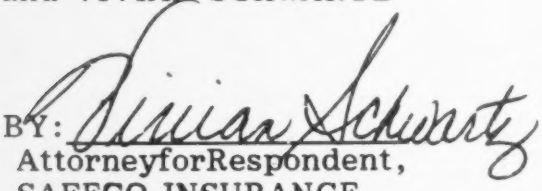
CONCLUSION

Based on the foregoing, it is respectfully submitted that: there is little difference between application of Rule 38 among the circuits; Petitioner's conduct in this proceeding would have justified the award of sanctions under any standard, including one requiring a showing of bad faith; and review by this Court is neither necessary, nor appropriate, in the context of these facts.

DATED:

Respectfully submitted,

L. E. SCHWEINER,
RICHARD G. FLANAGAN
and VIVIAN SCHWARTZ

BY: 
Attorney for Respondent,
SAFECO INSURANCE
COMPANY OF AMERICA

APPENDIX A

APPENDIX A

No. 87-6428

IN THE UNITED COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL CAMEN,

Plaintiff-Appellant,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,a Washington Corp.

Defendant-Appellee.

Case No. 87 02118 [JMI-Bx]

MOTION FOR SANCTIONS [C.C.P. 907]

AND FOR A FINDING THAT THE APPEAL

IS FRIVOLOUS[FRAP 36]

TO THE PARTIES HEREIN, THEIR ATTORNEYS OF RECORD AND TO THIS MOST HONORABLE COURT:

Please take notice and be advised that appellee SAFECO INSURANCE COMPANY OF

AMERICA, a Washington Corporation, hereby requests that this most honorable court render a finding that the appeal of appellant PAUL CAMEN is frivolous and that pursuant to FRAP 38 and C.C.P. Section 907 appropriate sanctions be assessed as against appellant. Dated: July 20, 1988 ROBERT P. BAKER and L.E. SCHWEINER By: ROBERT P. BAKER, Attorneys for Defendant-Appellee, SAFECO INSURANCE COMPANY OF AMERICA, a Washington Corporation

DECLARATION FOR ROBERT P. BAKER

IN SUPPORT OF MOTION FOR SANCTIONS

I, ROBERT P. BAKER, hereby declare that:

I am an attorney at law duly admitted to practice before all the courts of the State of California and am one of the attorneys of record for appellee, SAFECO INSURANCE COMPANY OF AMERICA, a Washington Corporation. All matters set forth in this declaration are of my personal knowledge unless otherwise specified and if called and sworn, I could and would so testify competently hereto.

On or about July 6, 1988 I received appellant's opening brief. I thereupon reviewed the arguments articulated and the legal support relied upon.

On or about July 15, 1988 I called the law offices of THOMAS WALL, counsel for appellant, to inform him that in my opinion his appeal was

frivolous. MR. WALL was not in his office, therefore, I left a message on his tape recorder.

On July 15, 1988, I memorialized my attempt to speak to MR. WALL with a letter. [A true and correct copy of said letter is attached hereto as Exhibit A and incorporated herein by reference.]

On July 18, 1988 MR. WALL called this defendant and we briefly spoke regarding the appeal.

I told MR. WALL that the policy language in the CAMEN insurance policy is exactly the same policy language which the court in Greene ruled was clear and unambiguous and which supported non-renewal. I invited MR. WALL to review the relevant portions of the CAMEN policy and compare same with the Greene decision. In fact I specifically pointed MR. WALL to the exact area of the policy.

I asked MR. WALL to consider withdrawal of

his appeal since his argument was entirely premised on his attempt to distinguish Greene and keep it from controlling. I pointed out to him that since the Greene court ruled on the exact same wording as was in the CAMEN policy I felt that case to have significant importance to the appeal.

MR. WALL declined to consider withdrawal of his appeal and indicated that he felt the court should decide the issue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of July, 1988, at Van Nuys, California, Singed: ROBERT P. BAKER, Attorney for Appellee, SAFECO INSURANCE CO. OF AMERICA.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SANCTIONS

1. FEDERAL RULE OF APPELLATE PROCEDURE 38 ALLOWS DAMAGES AND SINGLE OR DOUBLE COSTS TO THE APPELLEE UPON A DETERMINATION THAT AN APPEAL IS FRIVOLOUS.

Appellee refers this most honorable court to its reply brief filed concurrently with this motion and based on the contents contained therein argues that appellant has not in good faith taken this appeal.

Appellant bases his appeal on the premise that the case of Greene vs. Safeco Ins. Co. (140 Cal. App. 3d 535 (1983)) is not controlling because the language interpreted in that case is different than the case at bar.

That this blatantly untrue and as the

declaration of ROBERT P. BAKER indicates, that fact has been communicated to MR. WALL, counsel for appellant, yet he continues to proceed.

It appears that this sort of action can only be considered either harassing in nature or frivolous.

2. CODE OF CIVIL PROCEDURE SECTION 907 AUTHORIZES THE AWARD OF DAMAGES SUCH AS MAY BE JUST WHEN THE REVIEWING COURT DETERMINES THE APPEAL TO BE FRIVOLOUS.

Appellee reiterates its argument, supra, and requests this court to impose sanctions and costs as appropriate and just against appellant for this frivolous appeal. Dated: July 20, 1988, Respectfully submitted, ROBERT P. BAKER and L. E. SCHWEINER, Signed, ROBERT P. BAKER, Attorneys for Appellee, SAFECO INSURANCE COMPANY OF AMERICA.

"Exhibit A"

July 15, 1989

Law Offices of THOMAS E. WALL
12063 Jefferson Blvd.
Culver City, CA. 90230

CAMEN VS. SAFECO
FEDERAL COURT CASE # 87 02118 (JMI-Bx)

Dear Mr. Wall:

This letter will memorialize my conversation to your office of July 15, 1988 at approximate 2:25 p.m. You were not personally in your office so I left a message on your telephone recorder.

I indicated to you that it was my opinion that your appeal is frivolous and subject to sanctions as authorized by CCP Section 907.

I informed you that the logic you express in paragraph eight and nine of your brief is erroneous, since the Camen's policy and the Greene's policy are both Safeco policies, with exactly the same wording.

I indicated I would not begin my reply brief after close of workday on Monday, July 18, 1988. If I did not hear from you by then with your client's decision regarding Continuance of the Appeal, it would be my decision to proceed with my reply brief and seek appropriate sanctions. Very truly yours, Signed, Robert P. Baker, RPB/reb.